UNITED ASIAN BANK BHD.

v.

SEMRIT SINGH BHASSIE

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C2078/84]
21 NOVEMBER 1990

CIVIL PROCEDURE: *Dismissal of application in chambers - Application for further argument - Whether new affidavit or fresh evidence can be admitted - Discretion of Court - Requirements to be satisfied.*

The plaintiff's application for striking out of the defendant's defence and counterclaim was dismissed in chambers; plaintiff's Counsel subsequently applied for further argument and the matter was adjourned into open Court for this purpose.

After the dismissal in chambers of its striking out application, the plaintiff filed an affidavit (the said affidavit). At the commencement of the hearing in open Court, defendant's Counsel objected to the admissibility of the said affidavit, arguing that the Court could not receive new affidavit or fresh evidence at the further argument stage. The plaintiff's Counsel contended that the Court had jurisdiction to admit the said affidavit.

Held:

[1] The Court adopted the principle laid down in the case of *In re Munns and Longden* and held that when a matter is adjourned into open Court for further argument, no fresh evidence or new affidavit should be considered at the hearing of the further argument.

[2] (a) Further argument does not mean further evidence or further affidavit;

(b) when the matter is adjourned into open Court for further argument, the Judge has the opportunity to "reconsider" the order he made in chambers based on the evidence before him in chambers;

(c) if parties are allowed to introduce fresh evidence or further affidavit at the further argument stage, then the Judge will have to consider the whole matter afresh and this will defeat the purpose of further argument.

[3] (a)The Court has a discretion, albeit a fettered one, to allow such evidence at the further argument stage; however three conditions have to be satisfied before such evidence is admissible namely:

(i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(ii) the evidence must be such that if given, it would probably have an important influence on the result of the case, although it need not be decisive, and

(ii) the evidence must be such as is presumably to be believed, that is, it must be apparently credible, although it need not be incontrovertible.

[4] On the facts of this case, the conditions in 3 above were not satisfied.

[Defendant's objection allowed.]

Cases referred to:
Guannex Leasing Sdn. Bhd. v. Dr. Matthew Sebastian and Anor. [1990] 2 CLJ (Rep) 88
In re Munns and Longden [1834] 32 WLR 675
Ladd v. Marshall [1954] 2 All ER 745
Skone v. Skone [1971] 2 All ER 582
Tung Lieng (Penang) Trading Co. Sdn. Bhd. v. Liew Cheong Thye [1986] CLJ (Rep) 268

Legislation referred to:
Rules of the High Court 1980, O. 56 r. 2

Other sources referred to:
Mallal's Supreme Court Practice 2nd Edn., Vol. 1 p. 683

For the plaintiff - R. Kumarasamy; M/s. Ng Ek Teong & Partners
For the defendant - Harpal Singh; M/s. A.J. Ariffin, Chong & Harpal

JUDGMENT

Zakaria Yatim J:

This is an application by the plaintiff for an order that:

(a) the defence and counter claim dated February 1985 be struck out and the counter claim dismissed.

(b) the costs of the application and the costs of the action be paid by the defendant to the plaintiff as taxed.

The application was heard in chambers and after hearing both Counsel for the plaintiff and for the defendant, I dismissed the application with costs. On the application of Counsel of the plaintiff, I adjourned the matter into open Court for further argument.

At the commencement of the hearing in open Court, Mr. Harpal Singh, Counsel for the defendant objected to the admissibility of an affidavit, which was filed on behalf of the plaintiff after the plaintiff's application had been dismissed. He asked the Court not to consider the said affidavit at the further argument stage. In support of his argument, he cited an English case, *In re Munns and Longden* [1834] 32 WLR 675. In that case, the matter was heard by a Judge in chambers. It was argued fully and the learned Judge gave his decision. An application was made to set aside the order of the learned Judge and at the hearing of the application in open Court the applicant sought to introduce further evidence. It was held that the Court would not receive further evidence on a motion to discharge an order made in chambers.

Miss Kumarasamy, Counsel of the plaintiff submitted that the whole purpose of further argument was to rehear the matter. She said that the decision made in chambers was an interlocutory order and when the matter was adjourned into open Court for further argument, it was not an appeal against the order made in chambers. She added that the order made in chambers was not *res judicata* and the Court was not *functus officio*. According to her, by admitting the said affidavit, no prejudice would be caused to the defendant because the defendant himself, would have had the opportunity to file an affidavit in reply. She said that the Court had jurisdiction to admit an affidavit at the further argument stage.

It is common practice that when a party is dissatisfied with the decision of a Judge-in-chambers, that party may apply to the same Judge, within the prescribed time to have the matter adjourned into open Court for further argument under O. 56 r. 2 of the Rules of the High Court. If the Judge refuses the application he will issue a certificate that he requires no further

argument. When he issues the certificate he is *functus officio.* See *Tung Lieng (Penang) Trading Co. Sdn. Bhd. v. Liew Cheong Thye* [1986] CLJ (Rep) 268. If the Judge agrees to adjourn the matter into open Court for further argument, it is not for the purpose of rehearing the matter already heard in chambers as contended by Miss Kumarasamy. In *Guannex Leasing Sdn. Bhd. v. Dr. Matthew Sebastian and Anor.* [1990] 2 CLJ (Rep) 88, I said:

> If the matter is adjourned into open Court for further argument, the party who asks for further argument must present his argument in addition to what has already been argued in chambers. The party must either introduce additional issues or authorities or develop its argument to a more advanced point for the consideration of the Judge.

The question now is whether new affidavit or fresh evidence can be introduced at the further argument stage. The case, In *re Munns & Longden,* cited by Mr. Harpal Singh may be relevant to the present case. According to that case, when a Judge has heard and determined a matter in chambers he had no power to adjourn the matter into open Court. The applicant applied by a motion to discharge the order made in chambers. At the hearing of the motion, further evidence in support of the application was introduced. In his judgment in that case, Kay J said:

> It often happened that, after a case has come before a Judge in chambers, and he has heard it fully argued and given his decision, he is asked to adjourn it into Court. When the Judge has deliberately heard and determined the matter, there is no power of adjourning into Court. The question is here raised whether the Judge is, after a case is heard in chambers, able to receive further evidence on a motion to discharge the order ... After a Judge has given his reasons and shown the weak points of the case, if it were the practice to allow further evidence to be put in, that would be a most dangerous practice. There being a total absence of precedent or practice for allowing such further evidence to be used, I must refuse to receive it. If there were such a practice, it would amount to a practice of reviewing the decision by the Judge. When the Court is called on to admit further evidence it must be satisfied that the evidence in question could not have been given before.

Although in England, as indicated in *re Munns* case, there is no rule similar to our O. 56 r. 2, it seems to me that case may be regarded as analogous to the present case. I therefore propose to adopt the principle laid down in that case for the purpose of the present case.

Accordingly, when a matter is adjourned into open Court for further argument, no fresh evidence or new affidavit should be considered at the hearing of the further argument. Further argument does not mean further evidence or further affidavit. According to *Mallal's Supreme Court Practice* 2nd Edn., Vol. 1 at p. 683, the purpose of further argument

> is to give the Judge an opportunity to reconsider the order he has made, in the somewhat hurried circumstances of a hearing in chambers, on a chamber's day.

I respectfully agree with the view expressed by Mallal. When the matter is adjourned into open Court for further argument, the Judge has the opportunity to "reconsider" the order he made in chambers based on the evidence before him in chambers. If parties are allowed to introduce fresh evidence or further affidavit at the further argument stage, then the Judge will have to consider the whole matter afresh and this will defeat the purpose of further argument.

The question of admitting fresh evidence or new affidavit at the further argument stage is however at the discretion of the Court. But the discretion is not an unfettered one.

The Court may only exercise its discretion to admit fresh evidence under certain

circumstances. In exercising its discretion it has to apply the right principle. In my view, the principle laid down by the Court of Appeal in England in admitting fresh evidence on appeal, applies to a case where a party wishes to introduce fresh evidence at the further argument stage. The principle has been stated by Denning LJ in *Ladd v. Marshall* [1954] 2 All ER 745. In his judgment in that case at p. 748 he said:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

The above passage was approved by the House of Lords in *Skone v. Skone* [1971] 2 All ER 582.

I shall now consider whether the three conditions have been satisfied in the present case. The affidavit in question does not show that the evidence contained therein could not have been obtained with reasonable diligence for use at the hearing in chambers. The letters exhibited to the affidavit are correspondence between the plaintiff and the defendant in 1982 and 1983, that is, long before the date of hearing in chambers. These letters were in the custody of the plaintiff but they chose not to produce them when their application was heard in chambers. Secondly, upon reading the affidavit and the letters exhibited to it, I do not think they would have an influence on the result of the case even though the evidence might be credible.

For the reasons stated above, I rule that the affidavit in question cannot be admitted as evidence at the hearing of the further argument in open Court in the present case.

Also found at [1991] 1 CLJ 827